THE JUDICIAL USE OF TORTURE.[1]

PART II.

THE TREATMENT OF CRIMINALS IN ENGLAND.

THE illegality of torture in England has been a subject of boasting among Englishmen for more than five centuries, and it has been commonly attributed either to a famous clause in Magna Charta, or to a peculiar degree of humanity in the race. That the barons at Runnymede ever thought of the subject at all is highly improbable, because torture scarcely existed at the time in any part of Europe; and if they had intended to forbid the practice, they would undoubtedly have done so with the specific language that they used in describing other grievances. The Great Charter has come to be popularly regarded as a kind of prophetic document, which included in its protection all the rights of Englishmen, whether known in the reign of King John or not; but the suggestion that it was intended to forbid the use of torture, or directly prevented its introduction, will hardly bear the test of historical investigation. Nor, in view of the barbarous methods of execution in England, can the absence of torture be ascribed to any peculiarly humane feeling. No one can read the sentence of a man for treason in the last century, with its description of the process of hanging, drawing, and quartering, or remember that the punishment of a woman for the same offence was burning alive, without recognizing that there was no great tenderness for criminals. Moreover, the English had no hesitation in resorting to torture where the exigencies of criminal procedure called for it. It was a principle of law, a curious survival of archaic forms, that a person accused of crime could not be tried by a jury without his own consent; that is, he must voluntarily accept the trial, or put himself on the country, by pleading guilty or not guilty. If he refused to do so, and it was found that he did not stand mute by the judgment of God, he was, in cases of treason or misdemeanor, immediately convicted; but in cases of felony, where this was not allowed, the prosecution was blocked at the outset. It is obvious

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that a criminal could not be suffered to cheat justice by his silence; and hence he was subjected to the *peine forte et dure*, which meant that he was laid on his back under heavy weights, and fed with bad bread and stagnant water, until he pleaded or died. During the trials for witchcraft in Salem Giles Corey was killed in this way; his object in not submitting to trial being a heroic determination to preserve for his daughters his property, which would have been forfeited to the Crown by a conviction for the crime. It would seem, therefore, to be more likely that the humanity of the English people was promoted by the absence of torture, than that the absence of torture was due to any innate abhorrence of inflicting pain.

The real cause of the human method of trying criminals must be sought elsewhere, and especially in the early history of the judicial system. England was the first of modern nations to arise out of the wreck of the Roman Empire. Feudalism, with its loose connection between the overlord and his vassals, never became thoroughly established there, for the Norman kings had both the will and the power to prevent the barons from getting a large measure of independence. The most effective instrument for consolidating their authority was found in their courts of law, which steadily encroached upon the jurisdiction of the manors. Their policy was continued by the Angevins, until by the end of the reign of Henry II. the royal justice — exercised by the King's Court, or by itinerant judges commissioned to travel through the counties — was substantially universal in secular cases over the whole realm; and this at a time when in France the immediate jurisdiction of the King was confined to the royal domain. In short, England centralized earlier than the continental countries, and her centralization took a judicial form. The result was, that out of the barbaric customs of the early Middle Ages her courts evolved legal principles which were strong enough to resist the direct influence of the Roman Law. To the Englishman that law did not seem, as it did to the Frenchman, a light in the darkness, a model of order in the midst of confusion. It appeared as a foreign rival to his own Common Law, which embodied his habits of thought, and was sufficiently enlightened for his needs. Moreover, one of the chief sources of the strength of the Roman Law in France — the means it afforded the King of extending his jurisdiction — did not apply on the other side of the Channel, because the royal courts there were already omnipotent. Hence, Roman legal

ideas made slow progress in England, and were adopted by the common-law courts only so fast as they could be reconciled with the native jurisprudence, and fitted into it. All this was quite as true of methods of procedure as of substantive legal principles. When the barbaric forms of trial began to fall into disuse, there was nothing in France, Germany, or Italy to take their place; so men turned to the Roman Law for guidance, and learned from it the inquisitorial process and torture. But in England the institution which afterwards grew into trial by jury was already established. It was still in a rudimentary form, no doubt, but it was perfect enough for the wants of the time, and it reached a higher and higher state of efficiency as civilization advanced. Thus, the early creation of a centralized judicial system in England kept the Roman Law with its encouragement of torture aloof, while the development of the jury obviated the need of copying Roman forms of trial.

Trial by jury did more than this. It did not merely furnish a mode of trial that rendered the inquisitorial procedure with torture as its adjunct unnecessary. It provided a form of trial with which the systematic use of torture was hardly compatible. In Scotland, it is true, torture was freely used at a late period, in spite of the existence of a jury, at least in capital cases; and the same was the case to some extent in Denmark. But with these exceptions it never got a firm foothold in Great Britain or Scandinavia, where trial by jury prevailed; and the reasons are almost self-evident. The torture could not very well take place in the presence of the jury. Such a thing would have been too shocking to men who were, after all, the neighbors of the prisoner; and if it was inflicted upon him in secret beforehand, he would be certain to recant at the trial, and tell how his confession had been wrung from him by suffering, with a strong probability of arousing a violent prejudice in his favor; for a jury would be very differently affected by such a scene than a body of magistrates hardened by constantly dealing with criminals. The chief reason, however, why trial by jury discouraged systematic torture, as it was used in France, must be sought in the absence of a theory of proof. That theory began to appear in Rome after the popular tribunals were replaced by permanent magistrates, and it was brought to perfection by French and Italian courts composed entirely of professional judges. It was, indeed, adapted only to trained legal minds. A body of laymen called together on a single occasion to try one

case, or even a series of cases, cannot be expected to regulate their belief in the innocence or guilt of the prisoner by any artificial rules. Nor can they be made to subordinate their personal convictions to fine-spun theories of proof enunciated by the judge. It is not always easy to make them accept the law as he lays it down, and they are sure to reach their conclusion about the facts in their own way, subject only to such influence as the argument in his charge may have upon them. As one would naturally expect, therefore, no theory of proof grew up in England, and except for sporadic statutory rules, such as the one requiring two witnesses in high treason, it never had any existence there at all. Hence the principles that made torture a regular part of criminal trials on the Continent were quite unknown in Anglo-Saxon law.

All these things prevented torture from becoming a systematic engine for extorting confessions in England, but they did not make its use an impossibility. They could not prevent its appearance altogether, and in fact it was used to some extent at one period of English history. How early the practice began is not known, although there is a tradition that the rack was brought to the Tower in the reign of Henry VI. by the Duke of Exeter, and it was called, for that reason, the Duke of Exeter's daughter. It was certainly there in the time of Henry VIII., and continued to be used during the reigns of his children and of the first two Stuarts, in spite of repeated opinions by the best lawyers that it was illegal. Torture is said to have been employed only when authorized by special warrant from the King or Privy Council, and most of the positive knowledge of the cases in which it was applied is derived from entries in the records of the Council. But its use was by no means confined to high treason or other offences against the safety of the State. It extended also to common-law crimes, — such as murder and robbery, — although for cases of this class it seems to have come to an end at the death of Elizabeth. For political offences it lasted somewhat longer. Guy Fawkes, for example, was probably tortured to force him to confess his guilt in the Gunpowder Plot, and it is certain that a warrant for the purpose was issued in the King's handwriting. Several other warrants of a similar character were made under James and Charles, and the practice was not abolished until the Commonwealth.

Whether torture was ever used during this period without a special authority from the King or not, its existence was closely connected with the growth of the royal prerogative. The Wars of

the Roses by destroying a great part of the nobility removed a check upon the Crown, and enabled the Tudor sovereigns to make the monarchy far more like that of France than it had ever been before. The resemblance showed itself in many ways, and among others in the treatment of criminals; for the procedure at that time had a decidedly inquisitorial cast. And, indeed, it is a remarkable fact that almost every institution to be found in the history of England or of France has its counterpart in the other country, at least in germ, although its growth on the two sides of the Channel has usually been very different. The accused was arrested, kept in confinement more or less close, and examined, — in ordinary cases by a justice of the peace, in those of great political importance by the Privy Council, — the examination being sometimes carried on, as we have seen, by means of torture. He had no counsel, apparently no right to summon witnesses, and was not allowed to know the evidence against him. This might be given at the trial in the form of depositions, for the government was not required to produce its witnesses in court. The result was that he was, or might be, given no opportunity to cross-examine them, while, on the other hand, he was himself elaborately questioned before the jury, and, in fact, his examination was the very essence of the trial. The resemblance to the treatment of criminals in France is evident.

This was the mode of conducting a prosecution in the King's Bench, and it was certainly inquisitorial. In fact, it was more so than that of the notorious Star Chamber, which has, nevertheless, been regarded by posterity as the typical instrument of tyranny. That famous tribunal attained its greatest influence under Queen Elizabeth, and dealt with crimes — such as forgery, perjury, riot, fraud, libel, and conspiracy — which were not capital, and were supposed to be insufficiently punished at Common Law. The complaint, like that in an ordinary equity suit, was made by a written bill which was shown to the accused, who was, moreover, assisted and defended by counsel. The prisoner was, indeed, required to answer interrogatories under oath, — the so-called *ex officio* oath, — and this became an object of intense dislike, and was looked upon as an intolerable grievance. But when we reflect that the prisoner submitted without objection to an examination in the King's Bench, it does not seem probable that the interrogation under oath would by itself have made the Star Chamber an object of hatred. The real sense of wrong arose from the purposes to which it was

applied, for the tribunal, sitting as it did without a jury, was used under the first two Stuarts as a means of ruthless political persecution, the punishments being entirely out of proportion to the offence, or inflicted for no real offence at all.

The Star Chamber was abolished in 1640, and about the same time some improvements took place in the procedure in the King's Bench. Torture was given up altogether; the prisoner was allowed to call witnesses, who testified, however, without oath; the witnesses against him were produced in court; and although he was still questioned before the jury, his examination was no longer the main part of the trial. But these changes did not prevent the scandalous use of prosecutions for high treason to destroy political opponents. There is no period in the history of the world where state trials play so large a part in political life as during the twenty-eight years between the Restoration and the Revolution. From the trial of the Regicides to the bloody assize of Jeffries there is a constant succession of convictions and executions which mankind has since regarded, rightly or wrongly, as judicial murders. It is hardly too much to say that most of the sentences for high treason pronounced at that time were afterwards condemned by public opinion; and it was natural that people should at last discover something wrong in a condition that made such things possible. The trials of Russell and Sidney, and the frightful miscarriage of justice in the Popish Plot, opened men's eyes to the defects of criminal procedure, and after the Revolution of 1688 statutes were passed allowing the prisoner to have his witnesses sworn in both treason and felony, and granting him in cases of high treason the benefit of counsel, a copy of the indictment, and a list of the witnesses and jurors. But the most important changes took place without any express statute. Prosecutions for crime were left more largely to private individuals, and the trial became once more a battle between two parties, the judge occupying the position of an arbiter, whose duty was only to see fair play. The episode of monarchy after the continental type, with all its accompaniments, had come to an end in England, and the political current of the nation returned to the channel it had left more than two centuries before.

Shortly after the Revolution another great change occurred in the method of dealing with the accused. Ever since the thirteenth century there had been a struggle to restrict the jurisdiction of the ecclesiastical tribunals, the favorite method of attack being

the enactment of statutes forbidding them to summon a layman charged with any offence and examine him on oath. The original motive for the acts was not a dislike of the oath, but a desire to free laymen from the jurisdiction of these tribunals by prohibiting the first step in their regular course of procedure. As often happens, however, the means finally became an end in itself. The oath became the substantive object of attack, and by the early part of the seventeenth century the practice of interrogating an accused person upon oath was denounced as a violation of the maxim, *Nemo tenetur prodere seipsum.*[1] The maxim used in this sense was really new, but it derived additional force from the hatred of the *ex officio* oath in the Star Chamber, until at last it was boldly asserted to be a part of the law of God and of nature. The Star Chamber was abolished in 1640, and statutes enacted in 1641 and 1662 forbade the administering of any oath whereby a person "may be charged or compelled to confess any criminal matter." The objectionable oath, therefore, was at an end; but the maxim had acquired a wider meaning, which covered all attempts to draw evidence from a prisoner against himself, whether he was forced to take an oath or not, — a principle which was the more popular because it was diametrically opposed to the use of torture then prevailing on the Continent and in Scotland. Accordingly the habit of questioning the prisoner, which lasted through the reigns of the Stuarts, died out shortly after the Revolution, and again there followed another change in his treatment. The Common Law had long excluded from the witness stand persons who had a direct interest in the result of a litigation, on the ground that they were under a great temptation to testify falsely. This theory of the lack of credibility of interested persons applied quite as strongly, in fact more strongly, to the parties to the suit than to any one else, and hence neither the plaintiff nor the defendant was allowed to take the stand. Now after the prisoner ceased to be questioned by the prosecution at his trial, it was logical for the lawyers to extend to him the principle of exclusion from the stand on account of an interest in the result, which except in his case had been of universal application. It was not long before this was done, and thus the accused, whose examination had furnished the chief element in the trials under Charles I., was not only not forced

[1] For the origin, history, and transformations of this maxim, see the article by Professor Wigmore in the HARVARD LAW REVIEW, Vol. V., 71.

to testify one hundred years later, but was not even permitted to do so. His treatment, therefore, which had then closely resembled that of a prisoner in a French court, was now almost precisely the opposite.

In the United States the rule preventing the accused from testifying has been generally, if not universally, done away with by statute; but the Federal Constitution, and those of almost all the States, provide that he shall not be compelled to be a witness against himself. Whether such a provision is wise at the present day may well be doubted. If the French law protects the accused too little, it is questionable whether our law does not shield him too much. If the French criminal procedure is still too inquisitorial in character, trials in America have, perhaps, gone too far in the opposite direction. The idea that the trial is a battle, a fair fight, between two parties has taken such an exaggerated form that the importance to the community of the detection and punishment of crime is left almost completely out of sight. A sensational criminal case is popularly regarded as a game, in which the public takes much the same interest that it does in a yacht race or a prize fight. It likes to see the rules of the game observed without regard to their justice or fitness, simply because they are the rules of the game. It never considers how far those rules attain the real object of criminal procedure, the conviction of the largest possible proportion of guilty men that is compatible with the certainty of acquittal of the innocent. This is surely the true test, and we may fairly ask whether the privilege on the part of the accused not to testify is in accord therewith, or whether it is a legal survival that has lost its reason for existence, merely an approximation, and a very rough approximation, to justice, under a state of things that has passed away and made a more perfect approximation possible.

Taking the first half of the test, no one will deny that the rule in question hinders the punishment of guilty men. In many classes of crime, indeed, and those among the most injurious to the welfare of the community, conviction is almost impossible without putting the accused on the stand (or rather without permitting the jury to draw the natural inferences from his refusal to testify, for of course any other method of compulsion is out of the question). This is true of the bribery of public officials, of misconduct by the officers of corporations, and of many kinds of commercial fraud, not to speak of occasional mysterious murders. It is clear, therefore, that in certain kinds of offences, at least, the privilege protects the

guilty, tends to defeat the aim of the law, and ought to be abolished unless it can be shown that it lessens the danger of convicting the innocent. The general opinion of men who have had a large experience in criminal trials appears to be that it does not do so. There is a popular superstition that a clever lawyer can confuse and trip up any one by cross-examination, so as to make a perfectly truthful man appear to be lying; but every member of the bar knows how dangerous it is to cross-examine an honest witness, and some of the most skilful practitioners follow the rule of never asking a question unless they either know or do not care what the answer will be.

It may seem absurd, in view of the fact that the prisoner has now a right to testify, to suggest that the power to compel him to do so would be a positive benefit to the innocent, and yet it may very well be true in some cases. Innocent men always take the stand, and when they do not, the present rule is liable to prove a dangerous snare; for although the statutes which give the accused a right to testify provide that his not taking advantage of it shall raise no prejudice against him, and although the jury is always instructed not to allow his silence to affect their judgment, it does manifestly have a decisive influence on the verdict at times. It would not be difficult to cite cases where a presumption of guilt caused by the failure of the prisoner to tell his story can alone account for a conviction upon evidence otherwise quite insufficient. It may be added that the obligation to testify would often convince the public whether the prisoner is guilty or innocent, under circumstances where a widespread belief in his guilt now clings to him in spite of acquittal by a jury. A guilty man ought to be punished, and an innocent one ought, if possible, to be freed from all suspicion. It is not enough for justice or the public morals that he is saved from the actual penalty of the crime.

While the historic origin of a rule of law has very little direct bearing on the question whether it produces good effects at the present day or not, the hold of the principle on popular imagination is often due largely to historic associations. This is peculiarly true of the maxim that no one is obliged to furnish evidence against himself, and it may therefore be worth while to point out that the doctrine was at first proclaimed with the object of shielding the guilty rather than the innocent. As Stephen has remarked in his "History of the Criminal Law," it was most passionately insisted upon by men who had committed the acts with which they were

charged, but who looked upon the law that made those acts criminal as oppressive and unjust. In other words, it was claimed more as a loophole to escape the penalty of an odious law than as a protection to men who had not broken the law. But any such grounds for upholding the maxim are now gone, for no sensible man will assert that our criminal law is oppressive and unjust, or that people who violate it ought to be given a chance to defeat its enforcement. Moreover, it must be remembered that the privilege of silence is a very different thing to-day from what it was in the times when the practice of questioning the prisoner was dangerously associated with torture, when he had no counsel, no power to compel the presence of witnesses, no right to testify under oath, and when the prosecution could introduce almost any evidence, and the art of cross-examination had not been learned. Many other safeguards of innocence more effective than this privilege have since been invented, and they should be carefully preserved. If the change is made, the examination of the prisoner should be strictly limited. It should not be made until the rest of the evidence for the prosecution has been put in, and the government should be allowed to offer more evidence only to rebut new facts brought out by the prisoner or his witnesses. The questions should relate directly to the offence charged in the indictment, and not suffered to have the latitude ordinarily permitted in cross-examination. Above all, the protection of the prisoner against examination previous to the trial should be rigorously maintained. At present, no confession or admission made by him can be introduced in evidence, unless it was purely voluntary. If induced by any promise or threat of an officer of the government, it is excluded; and this rule should never be relaxed. It is the preliminary examination, rather than the questioning at the trial, that is the most objectionable feature of the French system of procedure. The real objection to the questioning at the trial in France lies in the fact that it is conducted by the judge, instead of the prosecuting attorney. But any preliminary examination of the accused, however conducted, offers, in the nature of things, a great temptation to oppressive and cruel treatment, and to prosecutions on insufficient grounds, while it tends to lessen the incentive to an independent and laborious search for evidence, and hence to a thorough investigation of the facts.

The history of criminal procedure both in France and in England has been deeply influenced by the growth of abstract legal theories. In France one theory made the examination of the pris-

oner under torture an essential part of almost every trial, while in England another theory, equally untrustworthy, excluded his evidence altogether. Torture has been abolished in France, and with us the evidence of the accused is now admitted if he chooses to give it; but in both countries the historical traditions are still extremely powerful. Of the two systems, as they stand, we believe that our own is far the better, and yet it would be presumptuous to assert that it has reached perfection.

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